EMMA MOSES

IBLA 75-395 Decided August 11, 1975

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application, F-16843.

Affirmed.

1. Alaska: Native Allotments

An allotment application must be rejected where the native did not complete five years substantial use and occupancy of the land prior to withdrawal. An applicant who was an infant of tender years at the time of withdrawal cannot qualify for an allotment on the withdrawn land.

APPEARANCES: Lewis Schnaper, Esq., of Alaska Legal Services Corporation for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Appellant's Alaska Native allotment application, filed pursuant to 43 U.S.C. §§ 270-1, 270-3; (1970), states that she used the tract applied for on a seasonal basis since 1927. The application was rejected by the Alaska State Office, Bureau of Land Management, by decision dated January 31, 1975, because she failed to show five years of substantially continuous use and occupancy prior to April 15, 1929, when all the lands on Nunivak Island were withdrawn by Executive Order No. 5095 for a National Wildlife Refuge. This appeal followed.

Appellant admits that she was but three years of age when the land was withdrawn for a wildlife refuge. Even while recognizing that this Board in Larry W. Dirks, Sr., 14 IBLA 401 (1974) and Louis P. Simpson, 20 IBLA 387 (1975), held that an applicant must show that he personally complied with the law in establishing occupancy and use prior to the effective date of withdrawal and that he may not tack on his parents' or grandparents' use and occupancy to establish a right in himself commencing prior to the time of withdrawal, she incorporated briefs by reference, submitted by Alaska Legal Services Corporation in those cases and prosecutes the appeal "in order to exhaust our administrative remedies."

The Board adheres to its decisions in Dirks and Simpson, and for the reasons set forth therein the decision below must be affirmed. It is patently obvious that a child of three years is neither twenty-one years old nor the head of a family; 43 CFR 2561.0-3. We said in Minnie E. Wharton, 4 IBLA 287, 300, 79 I.D. 6, 12 (1972), rev'd on other grounds, 514 F.2d 406 (9th Cir. 1975), as follows:

> To suggest that . . . [she] in 1933, or shortly thereafter, as a baby or young child, was holding the land . . . suggests a faculty for comprehension in a baby or young child which flies in the face of reason.

Therefore, pursuant to the authority delegated by the Secretary of the Interior to the Board of Land Appeals, 43 CFR 4.1, the decision below is affirmed.

Frederick Fishman
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Edward W. Stuebing
Administrative Judge